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In The

Supreme Court of the United States

October Term, 1967

No. 789

KRIEGER-RAGSDALE & COMPANY, INC.,
Petitioner,

— vs. —

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Krieger-Ragsdale & Company, Inc., prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, granting enforcement of an order of the National Labor Relations Board on the ground that the findings of the Board were not for purposes of judicial review subject to the substantial evidence test on the record considered as a whole, but rather were subject to judicial review subject to a test based

on determining whether the Board had abused its discretion by acting in an arbitrary and capricious manner.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit Printed May 25, 1967 is reported in 379 F. 2d 517(CCA-7 1967); 65 LRRM 2418;55 LC P. 11,950 and appears at Appendix A, pages ..... to ..... attached to this petition for a writ. A Petition for Rehearing was denied on August 8, 1967. The Decision and Order of the National Labor Relations Board appears in the Record. (J. A. 3-34)

JURISDICTION

The jurisdiction of the Court is involved under Section 1254(1) of the Judicial Code.

QUESTION PRESENTED

Do the proceedings below raise a substantial federal question as to the standard of judicial review applicable to unfair labor practice cases brought to enforcement under Section 10 of the Labor-Management Relations Act which have their origins as representation cases under Section 9 of the Labor-Management Relations Act.

STATUTE INVOLVED

Section 8(a) (5) of the Labor-Management Relations Act, 29 U.S.C. 158(a) (5), 61 Stat. 140 provides as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer —
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Section 9 of the Labor-Management Relations Act, 29 U.S.C. 159, 61 Stat. 143 provides as follows:

> Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: **Provided,** That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: **Provided further,** That the bargaining representative has been given opportunity to be present at such adjustment.
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: **Provided,** That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any indi-

vidual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defind in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it

shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3 No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and

there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Section 10 of the Labor-Management Relations Act, 29 U.S.C. 160, 61 Stat. 146 provides as follows:

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: **Provided**, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases

may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: **Provided,** That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his dicharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the dis-

trict courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, sec. 723-B, 723-C)..

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: **Provided,** That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: **And provided further,** That in determining whether a complaint shall issue alleging violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing

the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restrain-

ing order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the

Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the juris-

diction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7),

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grand such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: **Provided further,** That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: **Provided further,** That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: **Provided further,** That for the purposes

of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1).

STATEMENT

Petitioner operates a corporation engaged in special types of printing located in Evansville, Indiana. At the relevant times it employed 38 people in production of its products, excluding 8 supervisors. (J.A. 85-86; J.A. 96) Petitioner has a single location and a single building. The building contains two stories and a half-basement, and is of a brick and concrete block construction. The plant has been added to at different times, yet production in the main is carried on in three spaces in an open and unwalled area. This central core is occupied by the following activities: Composing and letterpress; Sheet offset; Bindery, and shipping and receiving. The paste-up and cold composition work occupy a separate room as do the camera, stripping and plate making activities. The web offset or roll fed off-

set presses occupy a room which parallels the camera, stripping and plate making room. The front of the building contains office space, behind which is the paste-up and cold composition room. On the north side of the main floor of the building is the letterpress and composing area, while immediately south of these areas is the sheet offset press area. Behind the letterpress, sheet offset and camera areas is the bindery area, and east of the bindery is the shipping and receiving area. (J.A. 52-53; J.A. 57; J.A. 101)

The sheet offset presses are separated from the composition and letterpress areas by an aisle which runs the length of the core production area of the plant. The sheet offset and composition and letterpress areas simply run into the bindery area and the same is true of the relationship between the bindery and shipping and receiving areas. The camera, stripping and plate making room opens on the south side into the web offset area and on the north side to the sheet offset area, while paste-up and cold composition open onto the composing area and center aisle. (J.A. 52-53; J.A. 55; J.A. 57-58; J.A. 64-65; J.A. 79; J.A. 87; J.A. 101; J.A. 103-104)

Petitioner had no apprenticeship program and all employees are trained while on the job by their foremen. (J.A. 55) Employees are hired without prior experience and the longest training period on any of Petitioner's equipment with someone "off the street" is three months or less. (J.A. 56; J.A. 59; J.A. 73) Petitioner has never hired "journeymen" because of the type of printing processes it uses and its finished product. These factors in addition to the closeness of its supervision make this unnecessary. Tr. 56; Tr. 61) There is no need for job classifications as such, since

most of the printing at the plant is of a repetitious type called "paper conversion." (J.A. 61; J.A. 101-102) Petitioner uses modern methods as a means of simplifying the skills needed to produce its products. Its skilled employees are limited to supervision who actually perform the work which involves skill. (J.A. 53-54; J.A. 58-59; J.A. 61-62; J.A. 72-73; J.A. 87-89; J.A. 101-102) Petitioner uses presensitized plates because they are "much simpler to make and easier for the pressmen to use;" it makes no Linotype put purchases it elsewhere; has all of its color plates made "outside;" and the skilled make-up work is performed by supervision. (J.A. 56; J.A. 57; J.A. 64; J.A. 101)

Petitioner maintains its letterpress operation as a service to its lithographic department. (J.A. 58) The lithographic and letterpress processes are performed on the same item. Thus, an item may be run on an offset press and need perforation, numbering or diecutting which is then performed on the item with a letterpress. J.A. 58-59) Similarly, Petitioner maintains two combination presses which have an offset as well as a letterpress unit. One of these presses used one process for about ten hours a week and the other process for about thirty hours a week. The other press runs on letterpress only as needed. (J.A. 66-67) Of Petitioner's total output, five per cent is "strictly" letterpress, while "the other 95 per cent would come from the offset department into the letterpress department for some operation." The operation on this type of work taking place in the letterpress department varies from a small amount to in some fifty per cent of the cases to as much as ninety per cent, "depending on the type of job it is." (J.A. 81) The items produced

by Petitioner are processed through its bindery and shipping and receiving department. (J.A. 87-90)

Of the thirty-eight people employed by Petitioner in the year 1964, some 18 were used in other departments in times varying from 10 to 226 hours, or from a day's work to as much as 6 weeks' work. What follows is a tabulation:

(See page 18)

NAME	DEPT.	WORK OTHER DEPT. (1964)	No. of HOURS	J. A. PAGES
Bob Lenn	Litho.	Bindery-Shipping-Stripping	67	60, 70, 100
Jim Hargett	Litho.	Binder-Letterpress	58	60, 69, 100
Bob Winnecke	Litho.	Letterpress	128	60, 72, 99
Paul Williams	Litho.	Shipping	27	60, 71, 99
Dan Fulton	Stripping	Bindery	98	61, 68, 99
Wayne Rager	Stripping	Composition-Cleanup	77	61, 77, 99
Rick Jackson	Plate Maker	Bindery	8	75, 99
Chet Wood	Camera	Litho. Press	104	57, 61, 98
Mike Gaddis	Compo.	Litho. Press-Bindery	226	61, 74, 98
Dale Walker	Compo.	Letterpress	10	61, 82, 98
Colon Privette	Letterpress	Bindery	105	61, 98
Haywood Thomas	Janitor	Bindery	216	86, 97
Kate Masterson	Bindery	Stripping	12	60, 87, 97
Barbara Hurt	Bindery	Stripping-Paste-up	210	60, 77, 97
Eloise Smith	Bindery	Stripping	15	60, 86, 97
Ann Phillips	Bindery	Litho. Press	12	60, 97
Marie Clark	Bindery	Stripping	180	77, 85, 96
Susan Miller	Cold Compo. Freight	Bindery	32	59, 96

Petitioner has no seniority system or job classifications as such delineated by a system of job progressions. (J.A. 61-63) This is so because "in our (Petitioner's) type of operation the people are flexible enough that they move from one department to another." (J.A. 63) When work becomes short, rather than send people home, Petitioner assigns them to other types of work. (J.A. 71) Employees of Petitioner often begin in one department and end up doing work of a different type in another department. (J.A. 63; J.A. 57; J.A. 72; J.A. 73-74) One employee works approximately equal amounts of time in two departments. All of Petitioner's employees have the same fringe benefits — vacations, holidays, insurance, etc. — use the same service facilities and are under the centralized supervision of the same person (J.A. 54-55; J.A. 51) Similarly, all but one of Petitioner's employees have the same hours, punch the same time clock and work on a forty-five hour work week. (J.A. 62; J.A. 69)

As a result of a hearing the local official of the Board found that 2 bargaining units were appropriate at Petitioner. One was composed of all "lithographic production employees at the Employer's Evansville, Indiana plant, including offset press operators, plate makers, strippers, camera men, paste-up, layout and art employees," and excluding all other employees. (J.A. 40) The other unit was composed of all "of the employees in the Employer's bindery and shipping and receiving department at its Evansville, Indiana, plant," and excluding all other employees. At the relevant times Petitioner had thirty-eight employees. (J.A. 85-86) The units found appropriate by the Board excluded 11 of these 38 (J.A. 38-43) The record shows

the following about the excluded employees:

(1) **Pat Graff.** This employee's duties consist of setting type by the cold method. This is done either on a photographic machine or typewriter with changeable type faces, and these items are again pasted up just like the composition for offset production runs. Her duties are directly related to the production of lithographic plates. This is all of her work. Her pay is in the medium range among all of Petitioner's employees and her working hours are also the same. (J.A. 106)

(2) **Mike Gaddis and Dale Walker.** Gaddis worked 226 hours in the lithopress and bindery areas during the work year prior to the hearing. (J.A. 98; J.A. 103) Ninety per cent of his work is processed through the paste-up department and ends up in lithographic. Walker worked his entire time in composing save for a few hours' work, on a letterpress. Forty per cent of his work goes to lithographic. His work area is within the core production area at Petitioner. (J.A. 105) Both men work the same hours as other employees, receive the same fringe benefits, and their pay is on the average with their fellow employees. (J.A. 54-55; J.A. 104).

(3) **Les Hart and Colon Privette.** Privette worked 105 hours during the year prior to the hearing as a cutter in the bindery located in the same room and directly behind his usual work place. (J.A. 98) Both of these men work five per cent of the time on strictly letterpress work, while ninety-five per cent of their work enters the letterpress department from lithopress, where work ranging from a small amount to ninety per cent is performd on the product, depending on the type of job it is. (J.A. 81)

(4) **Oscar Krietzer and Hayward Thomas.** The Bookbinders Union expressed a desire to represent both of these men on the basis of the fact they were traditionally represented by this union. (J.A. 95) As janitors, these men get supplies and paper, and perform janitorial duties throughout the plant. They deliver paper throughout the plant as needed. When paper comes in they unload it and when it goes out they load it. They also store paper when it comes into the plant. (J.A. 91; J.A. 95-96) Thomas, during the year prior to the hearing, worked 216 hours in the bindery. (J.A. 97)

(5) **Sharon Loetzerich.** The total hours worked by this employee are the same as other employees, but she works on Saturday morning as a means of keeping up on her proofreading of the work to be processed by all of Petitioner's employees. (J.A. 108)

(6) **Jane Diekmann.** This employee was hired for the summer and is a college student. The record shows she planned to come back to work the next summer. (J.A. 103)

(7) **Susan Miller.** This employee works as a cold composition employee as preparation for lithographic processing, and the remainder of her time is spent making production records and freight work. (J.A. 107) During 1964 she did a small amount of work in the bindery.

(8) **Barbara Hurt.** This employee was excluded from the lithographic unit, but included in the bindery unit. (J.A. 40) In 1964 she worked 200 hours in paste-up and stripping, which directly related to lithographic production. (J.A. 97) At the time of the hearing she was performing most of her work in paste-up, still as-

signed to the bindery area and spending seventy-five per cent of her time in paste-up and the remaining part of her time in the bindery. (J.A. 77)

REASONS FOR GRANTING THE WRIT

I. The Proceedings Below Raise a Substantial Federal Question as to the Standard of Judicial Review Applicable to Unfair Labor Practice Cases Brought to Enforcement Under Section 10 of the Labor-Management Relations Act Which Have Their Origins as Representation Cases Under Section 9 of the Labor-Management Relations Act.

The substantial federal question involved in the petition for a writ is well stated by the Court below as follows:

> "The Board takes the position that it has discretion in unit determinations. The company, on the other hand, contends that Board unit determinations are subject to review under the substantial evidence rules. The difference between the opposing positions is not trivial, for the result on review may well turn out to be different under the two standards. Unfortunately, the case law, which derives from **Packard Co. v. Labor Board,** 330 U.S. 485(1947) is not clear, for both standards are stated to apply generally, although it is not made explicit how each is to enter into consideration on review." (Appendix A, Pet. Br., p. .....)

As this Court knows, the **Packard Motor** case, supra, was decided prior to the amendments to the Labor-Management Relations Act brought about by Congressional passage of the popularly called Taft-Hartley Act. Prior to these amendments this Court read the words in Section 10 of this statute relating to judicial review of Board proceedings to mean a review based on "substantial evidence." Taft-Hartley, however,

added the following language to this section of the statute, "substantial evidence on the record considered as a whole." As held by this Court these words require more of a reviewing court that was formerly the case. **Universal Camera Corp. v. N.L.R.B.**, 340 U.S. 474 (1950).

The Court below, however, made a distinction between judicial review in unfair labor practice cases with origins in representation cases and cases simply involving unfair labor practices. The first are said to be reviewable under a discretionary standard, while the second are subject to substantial evidence. This discretionary standard is defined by the Court below as requiring a conclusion that the Board's "determinations were unreasonable or that they were arbitrarily and capriciously made." Similarly, the Court below made a distinction between factual issues and the judgment made on the facts by an administrative agency. The first are said to be subject to judicial review under the substantial evidence test, while the second were found to be subject to review under a discretionary standard. In granting enforcement, the Court below concluded that "given the measure of Board discretion in unit determinations, we are unable to conclude that the Board's determinations were unreasonable or that they were arbitrarily and capriciously made." In sum, the Court below implies that were the record in this case subject to review based on substantial evidence on the record considered as a whole, it would have come to a different result.

It is Petitioner's position that there is a need for a determination by this Court of the substantial federal question relating to the proper standard of judicial

review applicable to unfair labor practice cases having their origins in representation cases, since as admitted by the Court below the case law "is not clear." This is particularly so since the base case, **Packard Motor v. Labor Board**, supra, was decided before the Taft-Hartley amendments to the Labor-Management Relations Act. The confusion as to the proper standard applicable to representation matters which later become unfair labor practice cases is well stated in a case decided by the Court below. Thus, the Court below, contrary to its holding herein, found:

> "There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives. . . . These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving the application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules and regulations promulgated by the Board.
>
> "Unless or until Congress changes the language of the statute or the Supreme Court changes its interpretation of the statute, this court is bound by the rule of the Universal Camera case.
>
> "On oral argument counsel for the Board took the position that the scope of review by Courts of Appeals or orders of the Board as to representation elections was extremely narrow and that the

> Board's orders should not be set aside unless clearly arbitrary or capricious. Counsel could not think of an example of extreme arbitrariness or capriciousness, which, in his opinion would warrant setting aside an order. This position is far from the interpretation placed on the statute by the United States Supreme Court in the Universal Camera case."
>
> **Celanese Corporation v. N.L.R.B.**, 291 F. 2d 224, 225-26 (CCA-7 1961) Cert. den. 368 U.S. 925. Also see
>
> **N.L.R.B. v. Bata Shoe Company**, 377 F. 2d 821, 827-28 (CCA-4 1967) cert. den. (Press Release)

As the above makes clear, not only the Board's findings of fact must be supported by substantial evidence, but, in addition, its conclusions must also be supported by substantial evidence on the record when considered as a whole. **Celanese Corporation,** supra, at 226. Unless this is the case the substantial evidence rule would not apply in this type of case. In sum, to say that the substantial evidence test applies only to the facts and not to the conclusions arising from them is to say there is no substantial evidence test.

CONCLUSION

For these reasons Petitioner asks that this Cour grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1966 — APRIL SESSION, 1967

No. 15926

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

KRIEGER-RAGSDALE & COMPANY, INC., *Respondent*.

On Petition for Enforcement of an Order of the National Labor Relations Board.

MAY 25, 1967

Before HASTINGS, *Chief Judge*, and KNOCH and FAIRCHILD, *Circuit Judges*.

HASTINGS, *Chief Judge*. The National Labor Relations Board has petitioned this court for enforcement of its order directing Krieger-Ragsdale & Company, Inc., of Evansville, Indiana, to cease and desist from refusing to bargain collectively with the International Brotherhood of Bookbinders, AFL-CIO, and with Local 73 L, Lithographers and Photoengravers International Union, AFL-CIO.[1] The decision and order of the Board, upholding the trial examiner's findings of 8(a)(5) and 8(a)(1) violations of the Labor Management Relations Act, 29 U.S.C.A. § 158(a)(5) and (1), is reported at 159 NLRB No. 53.

In May, 1965, the unions involved in this case petitioned the Board for certification as bargaining representatives

[1] The Lithographers were permitted to intervene in the petition for enforcement; they filed a brief and participated in oral argument.

of the company's employees in two different units, a lithographic unit and a bindery, shipping and receiving unit. A hearing was held, and testimony taken, with respect to the propriety of the suggested units.

Upon the record of the hearing, the Board's regional director found the two separate units appropriate for bargaining and directed that an election be held for the employees deemed eligible. A number of employees were not found eligible for either unit and did not participate in the election. The company filed a request for review with the Board, which the Board denied.

On September 2, 1965, a representation election was held. In the lithographic unit, the employees voted 5-4 in favor of the union; in the bindery unit, the vote was 9-4 in favor. Thereafter the unions were certified as bargaining representatives.

In October and November, the unions filed charges that the company had refused to bargain. Complaints issued, and in its answers the company admitted its refusal to bargain, but challenged the appropriateness of the units and the propriety of the certification of the unions.

The Board's general counsel moved for summary judgment, which was granted. As stated, the Board adopted the report of the trial examiner.

On this petition for enforcement, the company reasserts its challenge to the unit determinations.

The Board takes the position that it has discretion in unit determinations. The company, on the other hand, contends that Board unit determinations are subject to review under the substantial evidence rule. The difference between the opposing positions is not trivial, for the result on review may well turn out to be different under the two standards. Unfortunately, the case law, which derives from *Packard Co.* v. *Labor Board*, 330 U.S. 485 (1947), is not clear, for both standards are stated to apply generally, although it is not made explicit how each is to enter into consideration on review.

Section 9(b) of the Labor Management Relations Act, 29 U.S.C.A. 159(b), gives the Board discretion to deter-

mine appropriate bargaining units; and the Board's informed exercise of discretion is rarely to be disturbed. E.g., *Packard, supra; N.L.R.B. v. Weyerhaeuser Company*, 7 Cir., 276 F. 2d 865 (1960). The same cases state that substantial evidence is also an applicable standard of review.

These standards, however, are not merely alternative formulations of a single standard. They differ in substance as well as form, and in the instant case, it is necessary to distinguish them in order to express clearly the functions of this court on review of unit determinations.

The discretion which the Board is entitled to exercise lies in the area of establishing, case by case, those facts which it deems generally relevant, but not conclusive, in the drawing of inferences. The discretion is exercised when the Board finds some set of relevant facts determinative in a particular case. *Cf.* Jaffe, Judicial Control of Administrative Action 555-56 (1965). The determination is discretionary because the relevancy and import of similar facts may shift from case to case.

Unit determinations fall into this category of discretionary decisions. Unit determinations are not findings of fact, but judgments upon the facts in accordance with varying guidelines of relevancy or rules of inference based upon experience and the purpose of the statute being administered. Because the exercise of discretion is a judgment and application of relevancy in a particular case, prior Board unit determinations in other cases have precedential value only in the sense that they disclose facts the Board has previously considered relevant.

The function of the substantial evidence rule in Board unit determinations is to examine the adequacy of the facts as found, not to test the judgment upon them. In the instant case, the substantial evidence standard does not have controlling application, for there is no actual contest over basic facts. The controversy relates essentially to the judgment on the facts. Our function, therefore, is to review the Board's exercise of discretion and decide whether the Board's unit determinations were reasonable, as applied to the facts.

A general policy of the Board appears to be to sever lithographic employees when the differences in skill and duties between lithographic and other types of printing employees is so great as to cause the lithographers to constitute a distinct group possessing a community of interest. Con. P. Curran Printing Co., 57 NLRB 185, 188-89 (1944). This policy has been approved by the courts. *N.L.R.B.* v. *Weyerhaeuser*, 7 Cir., 276 F. 2d 865 (1960). However, where differences between skill and duties are small, where work is interchangeable and interchanged, or where craft considerations are not important, the Board has refused to create a separate lithographic unit. Pacific Press, Inc., 66 NLRB 458 (1946); Pacific Coast Assn., of Pulp & Paper Manufacturers, 130 NLRB 1031 (1961); Weyerhaeuser Company, 142 NLRB 1169 (1963).

While the lithographic work done in the company's plant is not complex, the record discloses that operation of the machines in that department required a training period lasting from one to three months. This is far short of craft training, but not insignificant as an indication of a possible community of interest, particularly where employees in other departments do not have such training.

In addition to special training, it appears that no lithographic employee worked outside his department more than one hundred hours or approximately two and one-half weeks in a year.

The Board also found appropriate a separate unit of bindery and shipping department employees. Together with the similarity of their work, these employees had a distinct identity in the plant, interchangeably operated the bindery machines, worked in the same area of the plant, did not work appreciably outside the department and were supervised by the same foreman.

The company contends that the duties and activities of its employees are not such as to justify the creation of separate units. It argues that its operation is simple, so simple that special skill, training, or experience is not required of its employees.

While simplicity of operation is a matter which may be properly taken into consideration in determining community of interest, we do not find unreasonable the Board's position that it is not determinative. Involvement in the same productive processes, if they are sufficiently distinct from others in the plant, may create a sufficient community of interest, when considered with other factors, to justify a separate bargaining unit.

In the same vein, the company urges that the record discloses a ready interchange of skills and abilities within its entire work force. The record, however, does not quite bear out this last contention. It shows, with respect to the lithographic employees, that the three employees from other departments who did work in the lithographic department had either been originally trained in lithographic work or merely assisted there for a short time in the operation of a press. This evidence seems rather to demonstrate the real specialty involved in lithographic work.

The company further contends that countering the factors tending to create a community of interest, working conditions are similar for all of its employees and that its physical facilities and production processes are integrated.

To the degree that these factors may disclose that the interest of the employees throughout the plant was similar or identical, they are relevant to unit determinations. However, the record does not disclose an integration of plant and production processes so great as to show that the employees in the different departments had an undifferentiated congruence of interest. Given the measure of Board discretion in unit determination, we are unable to conclude that the Board's determinations were unreasonable or that they were arbitrarily and capriciously made.

The company's final contention, that the only appropriate bargaining unit at its plant would have been all of its production and maintenance employees, is simply a variation in wording of its other contentions. It is asserted that the effective result of the Board's unit determinations is the disenfranchisement of those em-

ployees not falling into either unit. This argument falsely assumes that only a unit comprising the employees of the entire plant would have been proper under the facts.

Notwithstanding our conclusions as to the propriety of the unit determinations, we have considered the contentions regarding each employee allegedly disenfranchised. We conclude that the Board did not act arbitrarily in excluding these employees.

The order of the Board under review will be enforced.

ENFORCEMENT ORDERED.